

# The West Australian

West Australian Newspapers Limited

A.C.N. 008 667 632

30 August 2007

The General Manager  
Adjudication Branch  
Australian Competition and Consumer  
Commission  
GPO Box 3131  
CANBERRA ACT 2601

By facsimile transmission (02) 6243 1211

Dear Sir

**Collective Bargaining Notification CB00003 Lodged by the Australian Newsagents Federation**

We refer to the letter dated 20 August 2007 advising that the Australian Competition and Consumer Commission ("**ACCC**") has received a collective bargaining notification ("**Notification**") from the Australian Newsagents Federation ("**ANF**") in relation to our distribution contracts and inviting us to comment on the Notification.

West Australian Newspapers Holdings Limited ("**WAN**") wishes to note at the outset that we have already embarked upon a review of our existing distribution arrangements, the objective of which is to achieve the most efficient and effective distribution system which will be cost effective for our customers -- the end consumers. We commenced this review process prior to the ANF making the Notification, with this business objective in mind, and we have already indicated to our distributors that we would welcome any comments and suggestions on the ways in which we might improve our systems.

Our preference is to continue to work with our distributors on an individual basis to address any issues with the current distribution arrangements which arise out of their particular circumstances. In our experience, this flexible approach is better suited to addressing the different concerns that individual distributors -- in different circumstances -- may have. In addition, it is more likely to result in benefit to our customers.

We are equally happy to take on board any views the ANF may have and had, prior to the ANF making the Notification, indicated to the ANF that we would do so.

That being said, we object strongly to any suggestion that the conduct described in the Notification be supported by the threat of a collective boycott. We consider that a collective boycott would give rise to significant public detriments and that the threat of a collective boycott is both inappropriate and disappointing in the circumstances. We also strongly object to any suggestion of the ANF which could lead to an increase in the cover price or delivery fees payable by our readers.

WAN also wishes to work in a constructive manner with the ACCC in relation to the Notification and the issues it raises. We have therefore sought to provide a comprehensive response in the time available.

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## Summary of concerns with Notification

In this context, therefore, WAN has concerns that the proposal by the ANF to engage in collective bargaining with WAN, in the manner described in the ANF's Notification, is likely to result in significant public detriments that will outweigh any public benefits and most importantly, is not in the interests of consumers in the State of Western Australia.

In particular, WAN is concerned that the collective bargaining proposed by the ANF, which would involve a substantial number of distribution agents dispersed throughout all areas of Western Australia, seeks a return to the past regulated distribution arrangements. WAN is concerned that such a situation would inherently result in distribution arrangements which do not address the individual circumstances of each distributor and in a more costly and inefficient distribution system, which will not be appropriate for WAN's business or conducive to the ability of WAN to efficiently service home delivery customers and consumers in general.

The ANF's collective bargaining proposal would appear to be primarily aimed at home delivery services and in particular increasing the fees payable to distributors to the detriment of WAN subscribers and home delivery customers in general. The ANF Notification states as follows:

*"The determination of the newsagent home delivery fee that can be passed on to customers has been made by WAN on an ad hoc and sporadic basis. The inconsistency of this approach has disadvantaged newsagents by not allowing customer fee increases to follow the increases in associated costs for providing the delivery service. As the control of costs is crucial to the achievement of a pleasing personal income for the newsagent, relying on WAN as a third party to make these decisions leaves newsagents out of control of their business."*

Such increases as the ANF proposes will, in turn, have an adverse impact on consumer welfare -- that is, the loss of substantial public benefits (as recognised by the Australian Competition Tribunal<sup>1</sup>) which result from low cost, efficient and broad home delivery of newspapers to the public.

WAN as the publisher of *The West Australian* is also disappointed by this statement of the ANF that WAN is a "third party". As the proprietor of the publications, WAN has every economic incentive to ensure an efficient and timely home delivery service to consumers. WAN's position is focused on ensuring end costs incurred by the consumer of its publications are cost effective. This is to be contrasted with the ANF statement:

*"The ANF proposes a performance based agreement style contract to drive overall efficiency across the newsagency industry."*

WAN's focus is upon the efficiency of its distribution system and how that impacts upon its customers - not profitability issues across the newsagency industry. WAN believes the ANF's Notification is misplaced to seek to drive broader issues for its members on the basis of WAN's products alone. Each newsagent should instead be focusing on its own individual business and financial circumstances across the whole range of products that it sells.

Against this background, WAN does not believe it is appropriate for associations to use collective bargaining processes to seek price increases to be passed on to consumers, particularly in a manner which includes a threat of collective boycott if their demands are not met.

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<sup>1</sup> Re: 7-Eleven Stores Pty Ltd, Independent Newsagents Association, Australasian Association of Convenience Stores Inc, (1998)

It is instructive that this Notification can be distinguished from the collective bargaining notifications<sup>2</sup> lodged by a number of Queensland citrus growers, to which the ACCC did not object. In particular, unlike the citrus growers' notifications, this Notification:

- involves a significant number of distributors representing a large geographic area of Western Australia;
- was preceded by an offer by WAN to discuss with distributors any comments and suggestions they might have on the ways in which we might improve our systems;
- concerns the renegotiation of a complex delivery structure which is integral to our business and which is quite different from a price setting mechanism for the sale of citrus fruit; and
- as noted above, includes the threat of a collective boycott.

The part of the ANF's Notification which states that a collective boycott offers "*the only other reasonable opportunity to facilitate change*" and "*ANF reserves the right to use this provision should collective negotiations fail*" is objectionable. WAN considers that any attempt by the ANF to seek immunity from the ACCC for such a boycott is inappropriate and highly anti-competitive, particularly given the number of newsagents which the ANF purports to represent, the geographic area which those newsagents cover, and the significant, detrimental impact that such conduct would have on competition and the ultimate consumer.

In summary, WAN strongly submits that the ACCC should not allow the ANF Notification, particularly with the threat of a boycott, as it is not in the interests of the broader community and consumers as a whole.

#### **Threshold issues**

There are some threshold issues which we believe need to be brought to the attention of the ACCC. These are:

- (a) the ANF has suggested in its notification that WAN is a voluntary participant in the collective bargaining process. This is incorrect. Seeking comments from a party by a certain date and taking the absence of response as voluntarily participating is unusual. The ANF lodging a Notification in this manner publicly suggesting agreement is provocative and inappropriate in a regulatory matter;
- (b) the information provided by the ANF in relation to the commissions and fees paid by WAN is incorrect and the suggestions of declining returns is also incorrect - we have sought to correct this in this letter. We also believe the ANF is taking an extremely long bow to single out one publisher and claim returns from that publisher are threatening a small business' viability when in all cases the business would be selling and distributing other newspapers and magazines and, in many cases, Lotto, gifts, stationary and convenience foods and soft drinks. Any analysis of costs cannot be taken in isolation. We find the following statement by the ANF in the Notification particularly unusual:

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<sup>2</sup> CB00001 & CB00002

*"The central business of a typical newsagency is the retailing and secondary distribution of newspapers and magazines within a defined territory as the contracted agent of the newspaper publishers.*

*Newsagencies are typically family businesses based in a retail shop, selling newspapers and magazines, usually also greeting cards, stationery, paperback books, cigarettes and confectionary. Many newspapers also act as a Licensed Post Office (LPO)."*

We would actually anticipate that newspaper sales these days are a relatively small proportion of a "newsagents" overall sales. We would urge the ACCC to check each applicants' position on this with verifiable data as this statement by the ANF as to the "central basis" of the business of a "newsagency" appears to be questionable;

- (c) the information lodged by the ANF indicates a fundamental misunderstanding of the nature of the contractual relationship and distribution structure between WAN and its distributors. In particular it is important to understand the nature of the home delivery customer relationship is between WAN and the customer (particularly taking into account the prevalence of subscriptions) and not between the agent and the customer. The assessment of benefits and detriments is quite different when these facts are taken into consideration. The issue of public benefit should be determined by reference to the cost to the customer, not whether a newsagent's business is viable; and
- (d) the collective bargaining arrangements described in the Form GA are uncertain in scope, with the result that it is not possible for WAN to determine, with a sufficient degree of specificity, the arrangements in respect of which the ANF is seeking immunity<sup>3</sup>.

Irrespective of WAN's view that the collective bargaining conduct proposed by the ANF is likely to result in significant public detriments that will outweigh any public benefits [and will have a significant and detrimental impact on competition,] the threshold issues set out above also appear to undermine the validity of the ANF's Notification<sup>4</sup>.

On a conceptual basis, WAN also believes this collective bargaining proposal is misplaced. We are rapidly bringing on stream our new printing presses to deliver a superior product to our customers. To the extent that the process has involved some teething issues with the new plant, these are being addressed and we are in the process of contacting distribution agents individually to discuss any concerns. While we welcome any suggestions that our distributors may have regarding the performance of our distribution arrangements and will take any comments on board, we prefer to deal with individual distributors flexibly, on an individual basis. We consider that this flexible approach -- as opposed to a "one size fits all" approach -- continues to be appropriate in this situation where there are differences on an individual basis, depending on individual circumstances. For example, the existing arrangements with our distributors accommodate the payment of additional allowances to

<sup>3</sup> Direction 9 of Form GA requires that an applicant must "provide a full and correct description of the key terms of the collective bargaining arrangement that have not been reduced to writing". We consider that the Notification does not provide such a description.

<sup>4</sup> In addition, Direction 5 to Form GA requires an applicant to provide proof of the consent of each of the persons which it purports to represent, agreeing to the lodgement of the Notification on their behalf. There is no evidence provided to us to suggest that those persons have consented to the lodgement of the notification on their behalf and we also question whether each person appreciates the unpleasant nature of a suggestion that they would boycott our product.

those distributors who have difficult territories to service. It is our preferred approach to review matters individually, with a view to seeking the most efficient outcome for the benefit of end consumers.

We now set out more detailed reasons for our views.

### **Background information**

In or about 1993, WAN withdrew as a member of the Newsagency Council of Western Australia. Prior to this the West Australian newspaper was distributed by the newsagents who were members of the ANF or the Newsagency Council and the Newsagency Council was a party to each newsagency agreement entered into between WAN and the newsagents.

Once WAN had withdrawn from the Newsagency Council, it proceeded to put in place Distribution Agreements and Shop Distribution Agreements with the individual newsagents. Neither the ANF nor the Newsagency Council of Western Australia became parties to these agreements.

A distributor is a person appointed by WAN to distribute its publications within a defined area.

The structure of the relationship between WAN, the individual distributor and the customer, is such that there is simply a sale by WAN to the customer and in consequence it is open to WAN to establish territories between its agents as there is no second sale from the distributor to the customer. In this regard, it is important to note that the ANF's Notification demonstrates a fundamental misunderstanding of the relationship between WAN and its distributors. For example, when providing details of the public benefits which it claims result from the proposed arrangement, the ANF states that:

*"[a]s the control of costs is crucial to the achievement of a pleasing personal income for the newsagent, relying on WAN as a **third party** to make these decisions [relating to the newsagent home delivery fee] leaves newsagents out of control of their business" [emphasis added].*

WAN's distributors, however, are appointed to act as agents of WAN for the purposes of distributing *The West Australian* newspaper to consumers. As distributors they play an important part in distribution. However, the customer is paramount and addressing the needs of customers is critical to our business. Naturally, in these circumstances, particularly given the nature of the relationship, the home delivery fee is not set by the distributor. The ANF's suggestion WAN is a "third party" is misplaced and demonstrates an inappropriate assessment of the competition impact of this Notification.

In addition, we could also like to highlight differences in the nature of the operations of newsagents. WAN enters into Shop Distribution Agreements with persons who simply operate a newsagents business and do not have a home delivery round attached. Some distributors have both a Distribution Agreement and a Shop Distribution Agreement. Part of the function of a distributor is not only to conduct deliveries to home delivery customers, but also to deliver publications to shop distributors within its territory.

The distribution agreement provides:

- (a) for a commission or handling fee to be paid to the distributor. In the case of home delivery, this is \$0.231 (including GST) in respect of the Monday to Friday publication and \$0.396 (including GST) in respect of the Saturday publication. If the publications are delivered to shop distributors, then the shop distributor and the distributor split the fee equally. In many instances, publications are delivered directly by WAN to shop distributors within a distributor's territory. In these circumstances the distributor nevertheless receives 50% of this fee;
- (b) a delivery fee which is payable by the customer for home delivery of the publications which is at present an amount of \$0.20 (including GST) in respect of the Monday to Friday publication and \$0.40 (including GST) in respect of the Saturday publication subject to a maximum permissible delivery fee of \$1.00 per week;
- (c) in addition, other fees can be agreed or determined by WAN if inserts are to be included with the publications and WAN has agreed a separate fee of \$0.275 (including GST) to cover circumstances where its publication is split into two sections.

WAN has concerns with a Notification which has as a fundamental basis an increase in price to consumers based on vague and unspecified performance indicators. The ANF states that:

*"Fees:*

*The proposed commission increase from the current 18-19% to the standard 25% per paper (received by newsagents nationally) would at the least provide WA agents with a greater means by which they can meet the increasing costs of running their business. Redirecting costs through performance based agreements will sharpen the rate of 25% to potentially greater profits. The home delivery fee set in 1997 of \$0.25 has not been reviewed since the advent of the split Saturday edition in 2007."*

Leaving aside the factual issues with the actual distribution fees payable by WAN or the fact that 25% commission is not set nationally (as far as we are aware, it depends on the role of an agent) or even why an Association should be allowed to seek to nationally set prices in such a way, we take exception as to why our publications should be the basis of increasing profits to newsagents. As explained earlier, newsagents sell and distribute a wide range of products. The impact on a small business' costs should be taken as a whole - not in isolation relating to one publication.

The ANF submission makes various unsubstantiated statements on home delivery fees and costs to newsagents or to shop only distributors as a broad proposition of inequity.

To correct these statements, we enclose charts reflecting, in respect of both the Monday to Friday publication and the Saturday publication, the relationship between the increase over time (since 1985) in the handling fee payable to the distributors and the growth in the Consumer Price Index.

It can be seen from the charts that, whilst the split delivery fee has remained the same, there have been appropriate increases in the handling fee payable to the distributors in consideration for their services. I note that the ANF indicates that the 25 cents fee payable in respect of the split publication is the only delivery fee payable. This statement is incorrect.

When the split delivery fee was introduced, it was intended to compensate the distributor for the additional work involved in delivering a split publication. As matters developed, the Saturday publication (which is the only publication to which the split delivery applies) was originally constituted by one very large section and one relatively small section. This has been the case since September 2006. The relatively large section was heavy and was the cause of some complaints from distributors as to its weight. In addition, it proved to be difficult to shrink wrap prior to delivery. The advent of the new printing presses (which have brought with them their own settling in problems as might be expected in the circumstances), has meant that we have now moved to a publication which is split into two equal parts. Neither part is as large as the larger section which had given rise to the complaints referred to above. In consequence, each section is easier to wrap and to deliver. The split delivery fee of \$0.275 (including GST), whilst payable only in respect of home deliveries, was also designed to compensate for the fact that split publications are delivered to shop distributors.

### **The proposed collective bargaining arrangements will not result in public benefits**

It should be apparent that WAN has separate and individual contractual relationships with each of its distributors and shop distributors. Each of them have different circumstances applicable to them. We do not believe that any substantive public benefits will flow from the type of negotiated agreement such as that which the ANF appears to have in mind. Rather, the collective bargaining arrangements contemplated by the ANF will lack the flexibility inherent in the current distribution arrangements which, in turn, have resulted in significant public benefits in the form of low cost, efficient and timely home delivery systems.

Ultimately, it is our objective to deliver our publication to our customers in a manner which, in our view, is the most timely and efficient and which minimises costs to the end consumer.

For these reasons, we have to date regarded the appointment of distributors in the manner described above as the most efficient means of achieving that business objective. Like any business, we are driven to achieve returns for our shareholders and, therefore, seek to establish the most cost effective means of delivering our publications for our customers. We believe that the return which we offer to our distributors and shop distributors is fair and commensurate with the effort they expend and the job that they do. We believe that the ANF's description of our distribution structure as an unsound distribution practice is to say the least a rather one sided view. It seems to us to be inherently anti-competitive for a third party association to seek to impose a new distribution structure on a publisher. For a newsagents association to seek to do this is a return to the past and in our view fails any public welfare test as it does not take into account broader consumer interests.

Whilst it is true to say that the introduction of new printing presses has resulted in some late deliveries, it is well known by our distributors that we are at an early stage in the commissioning of the presses. Whilst we are confident that efficiencies will improve, it may well be that the requirements placed upon our distributors will change in consequence of our changing production methods. In that event, we would expect to work flexibly with our distributors to react accordingly and to work constructively with our distributors to adjust their business practices accordingly to suit the area in which they operate. To this end, we have invited our distributors to suggest ways in which the current distribution arrangements could be improved and we are happy to engage in a constructive dialogue with distributors on those points.

Conversely, the collective bargaining arrangements envisaged by the ANF, while inherently uncertain with respect to their key terms, appears to represent a return to an inflexible, inefficient distribution system which would effectively defeat the substantial public benefits generated since deregulation. In particular their focus appears to be to increase the cost to the consumer which can hardly be described as being in the public benefit.

In this context, and given our preference to work constructively with our distributors to address any issues in a flexible and reasonable manner, WAN strongly objects to any suggestion by the ANF that it would use a collective boycott as a "reasonable opportunity to facilitate change" should collective negotiations fail. WAN considers that such a boycott would result in significant public detriments, not least because of the significant number of newsagents which the ANF purports to represent, the substantial geographic area covered by those newsagents and the adverse impact that such a boycott would have on the ultimate consumer.

#### **Policy aspects of the Notification and benefits vs detriments**

The ANF Notification states as follows:

*"The determination of the newsagent home delivery fee that can be passed on to customers has been made by WAN on an ad hoc and sporadic basis. The inconsistency of this approach has disadvantaged newsagents by not allowing customer fee increases to follow the increases in associated costs for providing the delivery service. As the control of costs is crucial to the achievement of a pleasing personal income for the newsagent, relying on WAN as a third party to make these decisions leaves newsagents out of control of their business."*

The above paragraph would appear to be at the heart of the ANF's Notification.

From a policy perspective, we note that the Notification seeks immunity from the ACCC from some serious prohibitions on anti-competitive conduct in the TPA. These are as follows:

- (2) A corporation shall not:
  - (a) make a contract or arrangement, or arrive at an understanding, if:
    - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
    - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
  - (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
    - (i) is an exclusionary provision; or
    - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Here what is being sought to be negotiated by the ANF is prices for the home delivery of newspapers and an attempt to have those prices increased to home delivery customers of one publication across the State of Western Australia. This is quite a serious matter and such price increases inherently would appear to have a significant impact on competition. This is also against a background of the new collective bargaining notification procedure having a time period of 11 days (not working days) for a Target to respond to a general request to negotiate a new distribution arrangement. Dealing with proposals that may lessen competition substantially or involve exclusionary provisions are quite serious matters, especially when coupled with a threat of a boycott if the Target declines to negotiate.



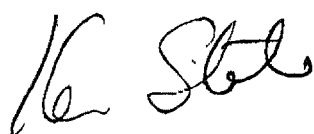
We do not believe that this Notification is consistent with the TPA or the Regulations. The Notification includes an explicit threat of a boycott, does not provide specificity of proposed areas of negotiation, but seeks a general renegotiation of a distribution arrangement and from a public policy perspective seeks price increases to be passed on to consumers. Again, we see these as significant public detriments which overcome vague and general suggestions of benefits through negotiating new performance based contracts, particularly when taken against a clear objective of the ANF of increasing delivery fees for consumers to the advantage of their members. The TPA is not about promoting one group over others, it is about promoting competition and the benefits that brings for consumers.

Distributors distribute other products such as magazines and other newspapers of competing publishers. Suggesting that distribution costs of one publisher have such a dramatic impact on the financial viability of individual newsagents is difficult to accept. If this occurs in relation to particular distributors who are facing difficulties, this is something which we are happy to discuss on an individual basis. However, we have great concerns with a proposal to increase prices across the board in the expectation that the general public will accept such cost increases. Instead of newspapers, customers can turn to a variety of sources such as the internet, television and radio. The assumption that newspaper readership will simply accept a cost increase is incorrect.

We are happy to consider discussions with the ANF on cost pressures for home delivery, but we do not believe that overall price negotiation in the manner suggested by the ANF is good for consumers. Rather, our preference is to discuss and address particular issues facing particular distributors on an individual basis.

For the reasons set out above, and unlike the collective bargaining notifications recently lodged with the ACCC by certain Queensland citrus growers, WAN considers that the collective bargaining arrangements notified to the ACCC will not result in public benefits, but will give rise to significant public detriments and constitute a return to the past. Accordingly, WAN strongly submits that the ACCC should not allow the ANF Notification, particularly with the threat of a boycott, as it is not in the interests of the broader community and consumers as a whole.

Yours faithfully



**Ken Steinke**  
**Chief Executive Officer**

